

Filed 12/12/16 P. v. Perryman CA2/7
Received for posting 12/13/16

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT JUNIOR PERRYMAN,

Defendant and Appellant.

B265183

(Los Angeles County
Super. Ct. No. MA064512)

APPEAL from judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Affirmed in part, reversed in part and remanded.

Kevin Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Albert Junior Perryman was convicted following a bench trial of grand theft, four counts of second degree burglary and identity theft. On appeal Perryman contends the trial court erred by allowing an amendment to the original information immediately before trial to add the count charging identity theft and by failing to obtain a jury trial waiver with respect to that count. Perryman also contends there was insufficient evidence to support separate counts of second degree commercial burglary relating to his efforts to purchase money orders at the United States Post Office in Lancaster. We reverse the conviction for identity theft and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Preliminary Hearing

Perryman represented himself at the preliminary hearing on October 22, 2014 at which Betty Ann Price, a clerk at the United States Post Office in Lancaster, and Los Angeles Sheriff's Detective David Keesee testified. According to Price, an individual who looked like Perryman used a debit card to purchase money orders from her and a colleague on June 25, 2014. Keesee explained he had investigated the June 25, 2014 theft of a debit card belonging to James Duncan and had viewed surveillance video of money order purchases made with Duncan's stolen debit card on that date at big-box department stores in Lancaster and Palmdale. Keesee identified Perryman as the individual conducting the transactions in both surveillance videos.

Keesee testified he had also investigated the use of Duncan's stolen debit card to purchase money orders at two United States Post Offices in Lancaster and Palmdale on June 25, 2014. Again, Keesee had reviewed surveillance videos

and identified Perryman as the individual using the debit card at each location. In addition, Keesee spoke with a custodian of records at Duncan's bank who reported Duncan's debit card had been used twice at an ATM in Lancaster on June 25. Keesee reviewed surveillance photographs from the ATM and testified the individual using the debit card resembled Perryman.

2. The Information

Perryman was charged by information with two counts of grand theft of personal property (Pen. Code, § 487, subd. (a))¹ and five counts of second degree commercial burglary (§ 459). As to all counts the information specially alleged Perryman had suffered two prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12) and had served one separate prison term for a felony (§ 667.5, subd. (b)).

3. Pretrial Proceedings and the Amended Information

The case was called for trial on May 21, 2015. After a prolonged colloquy with the court Perryman waived his right to a jury trial and his right to counsel, electing to represent himself as he had earlier during the pretrial proceedings. The court appointed his former attorney to serve as standby counsel.

On May 22, 2015 the People filed an amended information dismissing one count of grand theft of personal property, which had been based on the unlawful use of Duncan's debit card at an ATM, and adding a charge of unlawful use of personal identifying information, commonly referred to as identity theft. (§ 530.5, subd. (a).)² The court asked the prosecutor whether the newly

¹ Statutory references are to the Penal Code.

² The dismissed count identified Wells Fargo Bank as the victim of the theft of more than \$950 in United States currency.

added count was supported by testimony at the preliminary hearing; she replied it was. Perryman did not object to the amended information; Perryman's standby counsel was not present.

The following court day, May 26, 2015, Perryman objected by demurrer to the court's jurisdiction, stating he did not consent to trial and did not recognize the authority of the court. After making a rambling and largely incoherent presentation and despite being in custody, Perryman then attempted to leave the courtroom. He was restrained by two deputies and placed in lock-up. Based on Perryman's statements and his attempt to leave the courtroom, the court determined Perryman was no longer entitled to represent himself. The court revoked Perryman's self-representation rights and reappointed his standby counsel to represent Perryman at trial. Perryman refused to return to the courtroom that day and for the remainder of the trial.

Once reappointed, Perryman's counsel objected to the addition of the identity theft count and moved to set aside the amended information on that count, arguing it was not supported by evidence at the preliminary hearing. The court tentatively denied the motion, subject to reexamination at the close of the People's case. At the conclusion of trial Perryman's counsel

The new count alleged, "On or about June 25, 2014, in the County of Los Angeles, the crime of IDENTITY THEFT, in violation of PENAL CODE SECTION 530.5(a), a Felony, was committed by ALBERT JUNIOR PERRYMAN, who did willfully and unlawfully obtain personal identifying information of JAMES DUNCAN and used that information for an unlawful purpose and to obtain, and attempt to obtain credit, goods, services, real property, and medical information without the consent of JAMES DUNCAN."

renewed his motion to set aside the identity theft count based on lack of evidence at the preliminary hearing. The motion was denied on the ground evidence Perryman used Duncan's debit card without consent was sufficient to establish a violation of section 530.5.

4. Evidence at Trial

On June 24, 2014 Krista Garcia, Perryman's girlfriend, spent the night at the apartment of James Duncan, whom she had met through an online escort service. While Duncan was in the shower on the morning of June 25, 2014, Garcia took his debit card out of his wallet and left it, as well as Duncan's handgun, outside the front door in a duffel bag to be picked up by Perryman. Neither Garcia nor Perryman had Duncan's permission to use the debit card.

Perryman retrieved the debit card from outside Duncan's apartment and proceeded to a big-box store in Lancaster. Perryman attempted to purchase \$5,000 in money orders at the store with Duncan's debit card, but the transaction was declined. Perryman then went to a big-box store in Palmdale where he purchased a money order for \$1,000 using Duncan's debit card. Perryman attempted to purchase a \$3,500 money order with Duncan's debit card at that store, but the transaction was declined.

Perryman next traveled to the United States Post Office in Palmdale where he purchased two money orders with Duncan's debit card. Finally, Perryman went to the post office in Lancaster where he purchased a \$1,000 money order with Duncan's debit card. After that transaction was completed, Perryman purchased a second \$1,000 money order with Duncan's debit card from the same clerk. Perryman then walked away from the clerk's window, but returned a few minutes later and attempted to purchase a third \$1,000 money order with Duncan's

debit card from a different clerk. The clerk who handled the first two transactions interrupted and told Perryman, because his transactions collectively totaled \$3,000, he would need to show identification. Perryman left, saying he would get identification from his car. He did not return.

At some point during the money-order purchasing spree, Duncan's debit card was deactivated by his bank due to the suspicious activity. Perryman sent Garcia a text message requesting Duncan's address and social security number so he could reactivate the card. Garcia was able to surreptitiously obtain the information and transmit it to Perryman. Perryman then called the bank and used the information to reactivate the card. Garcia also testified she was able to correctly guess Duncan's personal identification number (PIN) and at some point that morning she provided it to Perryman.

Duncan discovered his debit card was missing around 10:40 that morning and alerted his bank and the police. On July 17, 2014 police arrested Perryman and Garcia in their apartment. Police found an ATM receipt and uncashed money orders that had been purchased with Duncan's debit card.

Perryman did not testify or present any witnesses in his defense.

5. The Verdict and Sentence

The court found Perryman guilty on all seven counts and also found true the prior conviction allegations. The court sentenced Perryman as a second strike offender to an aggregate state prison term of 12 years four months and imposed statutory fees, fines and assessments.³

³ The court imposed the high term of three years on one count of second degree burglary, doubled under the three strikes law, plus consecutive terms of 16 months (one-third the middle

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion in Permitting Amendment of the Information To Add the Identity Theft Charge*

The trial court may permit an amendment of an information at any time during the proceedings provided it is supported by evidence at the preliminary hearing and does not prejudice the defendant's substantial rights. (§ 1009;⁴ *People v. Birks* (1998) 19 Cal.4th 108, 129; *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1581; see *People v. Graff* (2009) 170 Cal.App.4th 345, 367 [“[a] preliminary hearing transcript affording notice of the time, place and circumstances of charged

term of two years, doubled under the three strikes law) on three additional counts of second degree burglary and one count of identity theft, plus one year for the prior prison term enhancement. Pursuant to section 654 the court stayed the sentence imposed on the remaining count of grand theft of personal property and the second burglary count involving the Lancaster post office.

⁴ Section 1009 provides, in part, “The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings The defendant shall be required to plead to such amendment or amended pleading forthwith, . . . and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination.”

offenses “is the touchstone of due process notice to a defendant””).) In determining whether the charges in the information are adequately supported, a trial court “should uphold the information as to any offense charged in the information of which any reasonable construction of the evidence adduced at the preliminary hearing admits.” (*People v. Barba* (2012) 211 Cal.App.4th 214, 227; see *People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1226 [“an indictment or information should be set aside only when there is a total absence of evidence to support a necessary element of the offence charged”]).) “[A]lthough there must be *some* showing as to the existence of each element of the charged crime [citation] such a showing may be made by means of circumstantial evidence supportive of reasonable inferences on the part of the magistrate.’ [Citation.] ‘Every legitimate inference that may be drawn from the evidence [presented at the preliminary hearing] must be drawn in favor of the information.’” (*Ibid.*) A trial court’s decision to permit the amendment of an information will not be reversed absent a showing of a clear abuse of discretion. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

As discussed, on the day before the start of trial, the People filed an amended information adding a count of identity theft in violation of section 530.5, which makes it unlawful to “willfully obtain[] personal identifying information . . . of another person[] and use[] that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person” (§ 530.5, subd. (a).) Personal identifying information is specifically defined in section 530.55, subdivision (b), and includes a person’s “name, address, telephone number, . . . demand deposit account number, savings account number, checking account number, PIN (personal identification

number) or password, . . . or credit card number of an individual person, or an equivalent form of identification.”

As he did in the trial court, on appeal Perryman argues adding the count charging him with identity theft was improper because a debit card is not one of the types of personal identifying information specifically listed in section 530.55.⁵ Although Detective Keesee testified surveillance video showed Perryman twice using the stolen debit card at a bank ATM, there was no testimony at the preliminary hearing—as there was at trial—that Perryman had also been given Duncan’s PIN by Garcia, which, Perryman concedes, would have supported the identity theft charge.

The trial court acted well within its discretion in permitting the People to file the amended information. Even if for some reason the unauthorized use of a stolen debit card, without more, does not come within section 530.55’s catchall category as “an equivalent form of identification” to a credit card, as Perryman contends, Detective Keesee’s testimony describing the surveillance video of the person he believed to be Perryman using Duncan’s card at an ATM unquestionably provided “circumstantial evidence supportive of reasonable inferences” that Perryman had acquired Duncan’s PIN. Nothing more was required for the People to include the identity theft count. (See

⁵ Perryman, who was still representing himself when the amended information was filed, did not object to the filing. After Perryman’s self-representation rights were terminated, the trial court considered the merits of counsel’s section 995 motion challenging the sufficiency of the evidence at the preliminary hearing to support the amended information. The Attorney General does not argue Perryman’s failure to object forfeited the issue.

People v. Barba, *supra*, 211 Cal.App.4th at p. 227; *People v. Superior Court (Jurado)*, *supra*, 4 Cal.App.4th at p. 1226.)

2. *Perryman Did Not Waive His Right to a Jury Trial on the Identity Theft Charge*

A criminal defendant has a fundamental right to a trial by jury under both the federal and state Constitutions. (*People v. Ernst* (1994) 8 Cal.4th 441, 444-445.) “A defendant’s waiver of the right to jury trial, as with other fundamental rights, may be accepted by the court only if knowing and intelligent—made with a full awareness of the nature of the right being waived and the consequences of the waiver. In addition, the waiver must be voluntary.” (*People v. Smith* (2003) 110 Cal.App.4th 492, 500.) A jury waiver must be made by the defendant himself in open court and may not be implied. (*People v. Martin* (1980) 111 Cal.App.3d 973, 979.) “[A] judgment in a criminal case resulting from a court trial must be reversed if the defendant did not expressly waive the right to a trial by jury.” (*Ernst*, at p. 443; see *People v. Collins* (2001) 26 Cal.4th 297, 310-311 [violation of the jury trial right is not subject to harmless error analysis].)

When an information is amended to charge a new offense after the defendant has waived his or her right to a jury trial, “this renders a prior jury trial waiver ineffective. New pleadings require a new waiver.” (*Le Louis v. Superior Court* (1989) 209 Cal.App.3d 669, 685; *People v. Sanders* (1987) 191 Cal.App.3d 79, 83 [reversing conviction on newly added count when defendant “was not asked nor did he expressly waive a jury trial on the new count which the district attorney had added”].)

Perryman did not expressly waive his right to a jury trial on the charge of identity theft added by the amended information. Perryman’s jury trial waiver as to all counts in the original information was properly obtained on May 21, 2015.

However, when the People amended the information and added the count of identity theft the following day, the trial court failed to obtain a waiver from Perryman on the new charge. Accordingly, as Perryman contends and the People concede, his conviction on that charge must be reversed.⁶ (See *People v. Sanders, supra*, 191 Cal.App.3d at p. 83 [reversing conviction on later added charge for which defendant did not waive jury trial but holding jury waiver remained effective as to previous counts]; *People v. Walker* (1959) 170 Cal.App.2d 159, 166 [reversing conviction on charge in amended information despite prior jury waiver because “with this new pleading there arose the right to an arraignment thereon, plea and jury trial. The record before us does not disclose a waiver of that right in accord with the constitutional provision”].)

3. *Substantial Evidence Supports Perryman’s Conviction on Two Counts of Burglary of the Lancaster Post Office*
a. *Standard of review*

In considering a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find

⁶ In some situations the failure to obtain a jury waiver on a newly added charge may require reversal of a defendant’s convictions on all counts to permit the defendant to reassess his or her decision to elect a bench trial in light of the full range of charges. Here, however, Perry has argued only that the identity theft conviction must be reversed because of the failure to obtain an effective jury trial waiver as to that charge.

the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the [trier of fact] could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the [trial court’s] verdict.’ (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

b. *Governing law*

A person is guilty of burglary when he or she enters a building or store with the intent to commit a larceny or felony. (§ 459; *People v. Tafoya* (2007) 42 Cal.4th 147, 170.) “[T]he conduct described and proscribed by section 459 is a single act: entry.” (*People v. Washington* (1996) 50 Cal.App.4th 568, 577.) It follows that to be convicted on two separate counts of burglary, a defendant must have entered a building two separate times or separately entered a room that “provides an objectively reasonable expectation of privacy and security, distinct from that the enclosing structure itself provides” (*People v. Garcia* (2016) 62 Cal.4th 1116, 1123; see *Washington*, at p. 579 [“every entry with the requisite intent supports a separate conviction”].)

c. *There was sufficient evidence Perryman committed two burglaries at the Lancaster post office*

Perryman does not dispute he committed burglary at the Lancaster post office on June 25, 2014 by entering with the unlawful intent to purchase money orders with Duncan’s stolen debit card. But he argues there was not sufficient evidence to support the court’s finding he left the Lancaster post office after the unlawful transactions and then reentered with the intent to consummate a new transaction, which is required to convict him on two counts of burglary. Specifically, Perryman contends postal clerk Betty Ann Price did not unequivocally testify he left the building after purchasing two money orders from her. Perryman also argues the surveillance video shows only an unidentified African-American man entering the post office, leaving the building and then reentering seven minutes later. There is no evidence, he contends, that he was that individual.

Perryman’s argument fundamentally misapprehends the deferential standard of review that governs his appeal. Price

testified Perryman purchased two money orders from her at the post office then left the building and returned approximately 15 minutes later at which time Price saw him attempt to purchase a money order from another clerk. On cross-examination Price equivocated somewhat in her assertion Perryman left the post office, stating, “I thought I saw him leave the building, walk outside the building. I didn’t see him in my view. Where my window is, I have a clear view of the door. I can see pretty much everyone that walks in and walks out, and I thought I saw him exit the building.” Price went on to state she did not have a clear view of the entire public area from where she sat and she did not “specifically remember” whether Perryman left the post office or just walked to another area.

It was the trial court’s responsibility to evaluate Price’s demeanor, credibility and the degree of certainty with which she testified she saw Perryman leave the building: “In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Furthermore, the “strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the jury in the first instance” (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.)

Here, the trial court evaluated Price's credibility and resolved any uncertainties in her testimony in favor of giving credence to her testimony. Perryman left the building after the first two transactions. That conclusion was neither a physical impossibility nor an apparently false one. To the contrary, the fact Perryman left the immediate vicinity for approximately 10 minutes, during which Price could not see him from her position, reasonably supported the inference he left the building.

Moreover, Price's testimony was not the sole basis for the finding that two separate burglaries had been committed at the Lancaster post office. Walter Horn, a senior technical surveillance specialist for the United States Postal Inspection Service, testified at trial that he had retrieved the video surveillance footage from the Lancaster post office for the morning of June 25, 2014. The prosecution played a few moments of the surveillance video during trial so Horn could describe how the time stamp worked and explain the video showed the lobby and front doors of the post office. The entirety of the surveillance video was thereafter admitted into evidence. The video clearly depicts an African-American man entering the post office at 10:32 a.m. and conducting a transaction at the cashier window. The man then leaves the building through the front doors at 10:34 a.m. At 10:41 a.m. the same man reenters the post office through the front doors, gets in line and eventually proceeds to the cashier window.

Perryman attempts to minimize the significance of this evidence because it was not played in its entirety during the trial and because there was no testimony the man in the video was Perryman. Neither argument has merit. The entire video was admitted into evidence and was properly considered by the trial court even if not played in open court. Just as a jury may take exhibits into the jury room for closer review, so too a trial judge

acting as the finder of fact may review exhibits outside the presence of the parties. (See § 1137; see generally *People v. Douglas* (1977) 66 Cal.App.3d 998, 1006 [§ 1137 extends to tape recordings].) The trial court in announcing its decision specifically stated it had carefully weighed and considered all the exhibits, and we must therefore presume the court reviewed the surveillance video in its entirety. Although, as Perryman contends, there was no testimony identifying him as the man in the video, the trial in this case extended over three days during which Perryman represented himself and engaged in extended colloquies with the court. The trial court was fully capable of determining whether the individual on the video was Perryman. In sum, the evidence amply supported Perryman's conviction on two separate counts of burglary of the Lancaster post office.

DISPOSITION

Perryman's convictions for grand theft and four counts of second degree burglary are affirmed. The conviction for identity theft is reversed and the case remanded for further proceedings. In the event the People elect not to retry the identity theft offense or if Perryman is retried and found not guilty of identity theft, the trial court shall modify the sentence previously imposed to strike the consecutive 16-month state prison term imposed on that count.

PERLUSS, P. J.

We concur:

SEGAL, J.

KEENY, J.*

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.